Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-417

CHARLES BRADLEY GRIFFITH
on behalf of himself and all
others similarly situated,

Plaintiff,

v.

RICHARD M. NIXON;
the President of the United States;
the Vice President of the United States;
the Committee for the Re-election of the President;
and the Finance Committee to Re-elect the President,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Charles Bradley Griffith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 17, 1975.

OPINIONS BELOW

The full opinion of the Court of Appeals (not yet reported) appears in the Appendix hereto as does the full opinion of the Vermont Federal District Court,which the Court of Appeals affirmed. The pertinent portion of the District Court opinion appears below.

> In the instant case the removal and the manner of succession of a President are explicitly committed by the Constitution to the Congress and not the Courts. The remedy

for the type of acts complained of in this case is vested in Congress by virtue of Article II, Section 4, which states , "The President, Vice President, and all Civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The manner of succession and the timing thereof is explicitly set forth in Article II and in the 25th Amendment, as is the manner in which the Vice President is to be selected upon a vacancy in that position. Since there is a "textually demonstrable Constitutional commitment of the issue [to a coordinate political department]," [Baker v. Carr, 369 U.S. 186, 217 (1962)], raised by this aspect of the request for relief, it seeks to present a non-justicable political controversy that is inappropriate for decision by this Court.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was dated and entered on June 17, 1975. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The U. S. Court of Appeals in affirming the District Court's opinion held, in substance, that the function of adjudicating and redressing a Presidential election that was fraudulent, corrupt, and unable to meet minimal Constitutional standards is "textually" and "explicitly" committed to Congress by the Impeachment Clause - Article II, Section 4 - and the succession clauses "in Article II and in the 25th Amendment."

1) Whether there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department," Baker v. Carr, 369 U.S. 186, 217 (1962)?

2) Whether the Impeachment Clause "textually" and "explicitly" commits to Congress the right to impeach and convict a President who is innocent of any misconduct, in or out of office, if his election was fraudulent.

3) Whether this is a case - judicial in its character - to hear, test, and determine the right and title to the office of President; a power clearly distinct from the right of Congress to impeach and convict a President for "high crimes and misdemeanors."

4) Whether a President's title to office and a President's misconduct are stocastically independent questions to be handled by the Federal Courts and the Congress respectively (i.e., whether it is possible for a President to have committed no misconduct yet not have a legitimate title to office; or have committed misconduct yet have a legitimate title to office; or both; or neither....).

5) Whether the Impeachment Clause was meant to create an exclusive means of removing a President.

6) Whether the XX Amendment or, instead, Article II, Section 1(5) and the XXV Amendment dictate means of Presidential Succession after an election has been found void and there is consequently no President-elect or Vice President-elect.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Impeachment Clause, Article II, Section 4. The succession clauses: Article II, Section 1(5); the XX Amendment, Section (3), and the XXV Amendment, Sections 1 and 2. And the Succession Act of 1948, Title 3 U.S.C., Section 19 and 62 Stat. 677. The preceding are set forth in the Appendix.

STATEMENT OF THE CASE

The corrupt nature of the 1972 Presidential election brought into serious question the legitimacy of that election and, in turn, the legitimacy of President Nixon's title to office. It also exposed the frightening possibility that a Presidential election - no matter how corrupt, fraudulent, manipulated, and controlled - was for all practical purposes incontrovertible if the corruption was national in nature (interstate as opposed to intrastate) because the necessary legal precedents had not been established...For any suit contesting a Presidential election without the force of precedents would probably flounder in a sea of

delay and indecision, allowing the contested term of office to inexorably expire or, the unthinkable, giving a corruptly elected, malevolent Administration time to successfully usurp for itself all the powers of government - a situation not unfamiliar to history.

In consequence, the petitioner-plaintiffs, feeling strongly that the 1972 Presidential election should be contested on its merits and that the technical questions (justiciability, etc.) should be settled for the future safety of American democracy, filed a complaint with the Federal District Court of Vermont relying upon 28 U.S.C. Section 1343 and 1331 for jurisdiction.

In this complaint plaintiff Charles Bradley Griffith, on behalf of himself and all those similarly situated (all those "who suffered disadvantage to themselves" - i.e., "all the registered voters of 1972 who were in opposition to President Nixon and his Administration or would have been if the truth, vis-a-vis Nixon et al, had not been unlawfully kept from them and/or if a more acceptable candidate had not been unlawfully manipulated out of the Democratic...nomination." Complaint par. #5 & #170, respectively) seeks a determination that, in violation of Constitutional and statutory guarantees, defendants (and "agents who acted for defendants or were under defendants' direction and control," complaint #11) did cause to be deprived, did conspire to deprive, and did deprive plaintiffs of their right and privilege to "Free Elections" (specifically "the right, when elections are held, to have said elections free from control - i.e. free from any manner or form of manipulation that would debase, dilute, diminish, or deny the vote of any segment of the American public that has been given the right to vote," complaint #165), their right to vote, their right to know, and their right to equal protection of the law by corrupting and manipulating the nominational-electoral process through the commission of massive and pervasive "Informational Irregularities," election irregularities that corrupt the decision making abilities of the electorate

(INFORMATIONAL IRREGULARITIES

"A. <u>SUPPRESSION</u>...of information
(a) Cover-ups
(b) Inaccessibility

B. <u>REPRESSION</u>...of information sources
(a) Sabotage
(b) Intimidation
(c) Censorship

C. <u>ESPIONAGE</u>...to acquire information
(a) Burgling
(b) Bugging
(c) Surveillance

D. <u>EXTORTION</u>...of monies to propagate information
(a) Fear-vending
(b) Favor-vending
(c) Blackmail

E. <u>FABRICATION</u>...of misinformation
(a) Counterfeiture
(b) Entrapment
(c) Prosecution," Complaint #20)

which were determinative - e.g. if the electorate on election day had had knowledge of all the embarrassing information being unlawfully covered up (directly or indirectly) and of all the unlawful cover-up activities themselves, they would have voted quite differently, very possibly reversing the outcome of the election; if the fragile images of the candidates for the Democratic nomination had not been unlawfully manipulated, the Democratic nominee could quite possibly have been someone other than George McGovern, and if, concurrent with the above, the ways and means of information propagation had not been unlawfully mobilized and acquired, what then... (see Complaint #156). Wherefore, the Complaint seeks a determination that the Presidential election and nominations are null and void and that new elections and primaries be held and damages paid.

The District Court of Vermont dismissed the Complaint holding, without examining any counter arguments therein, that "The remedy for the types of acts complained of in the case" (i.e., the function of redressing a corrupted and fraudulent Presidential election - the testing of a man's title and right to the Presidency and, if it doesn't exist, the termination of his term of intrusion into that office) is "textually" and "explicitly committed b the Constitution to the Congress" by virtue of the <u>impeachment clause</u> - "Article II, Section 4" and the <u>succession clauses</u> found "in Article II and in the 25th Amendment."

The U.S. Court of Appeals affirmed this decision, simply saying "The District Judge wisely decided that his duty was limited to interpreting the Constitution not rewriting it," completely avoiding the difficulty of supplying a supportive rationale.

REASONS FOR GRANTING WRIT

* Important Constitutional and Federal Jurisdictional Issue *

The U.S. Court of Appeals in this case decided Constitutional and Federal jurisdictional questions - never before settled by the Supreme Court - whose importance extends infinitely beyond the instant action and the answers to which will determine whether or not the Federal Government has the means to protect the integrity of the Presidency and Democracy. Alexander Hamilton in speaking of intervention in National elections said "every government ought to contain in itself the means of its own self preservation," Federalist Papers (59). The Supreme Court has echoed this on numerous occasions, most recently in Oregon v. Mitchell, 400 U.S. 112, 134 saying "The Framers of our Constitution were vitally concerned with setting up a National government that could survive." And Justice Brennan in An Affair With Freedom (p. 279) said that our Founding Fathers, in framing the Constitution, "sought to design a political system which would make it unnecessary for Americans to ever again exercise the right of revolution they had claimed in the Declaration of Independence." Clearly the weight of opinion and logic demands that the Federal Government have the wherewithal to defend its institutions - specifically the institution of the Presidency - and, hence, that some competent body of the Federal Government have the right and ability to adjudicate (supply a remedy) when the title to the Presidency is contested or challenged.

The Court of Appeals decision affirmed the District Court's decision that the Federal Courts do not have jurisdiction to try the validity of a Presidential election that was allegedly fraudulent, corrupted, and unable to meet minimal Constitutional Standards (i.e., the jurisdiction to try a man's title to the Presidency and, if

found lacking, terminate his term of intrusion into office) because the Impeachment Clause "textually" and "explicitly" commits this power to Congress. This decision is in error, a very dangerous error, for Congress, as this petition will show, has neither a Constitutional given right, a self-given statutory right, or the will or temperament to hear, test, and determine a man's right and title to the Presidency. And the decision of the Court of Appeals therefore leaves this country without any remedy for intrusions into the Presidency, without any governmental body with the power to try a man's right and title to the Presidency,.. as when, e.g., an incumbent "acting" President refuses to relinquish his office to a newly qualified President (see the XX and XXV Amendments and Title 3 U.S.C. Section 19) claiming that he does not, in fact, meet the Constitutional and/or Statutory requirements necessary to assume the Presidency; or the incumbents title is challenged because he, it is claimed, is Constitutionally ineligible to be President or that his selection by the House of Representatives upon whom the right had devolved was unconstitutional (e.g., he was not picked from those Constitutionally eligible under the XII and XX Amendments) or that his election was fraudulent and corrupt, failing to meet the necessary Constitutional and Statutory standards to be a valid election.... As the numerous challenges to a Governor's election, qualifications, disability, term of office, etc., have demonstrated, one must expect the extraordinary to occur...and be prepared.

Possibly because of their distaste for the difficulty of the subject matter and their predilection, though probably unconscious, against taking pro se suits seriously (as most law clerks will attest), the District Court and Court of Appeals judges totally avoided any substantive analysis of their decision, and in so doing forfeited the opportunity to discover whether they had misread the case and errored in their decision, and also left everybody else in the dark as to how their decision, in practice, could possibly function. It, therefore, is imperative that this petition be granted so that the Supreme Court can write a clear, concise, in depth decision that will act as a guideline for future challenges to and contests over the title to the Presidency.

* MERITS *

1. A PRESIDENT IS NOT IMPEACHABLE WHEN HIS ELECTION IS FRAUDULENT IF HE WAS NOT INVOLVED OR IF IT CANNOT BE PROVED HE WAS INVOLVED IN THE CORRUPTION - i.e. GUILTY OF "HIGH CRIMES AND MISDEMEANORS."

As was made eminently clear by the 1974 impeachment hearings of the House Judiciary Committee a President must commit some misconduct to be impeached and even the most liberal interpretations of "high crimes and misdemeanors" were very restrictive in what they considered impeachable misconduct. The Constitional Convention rejected such terms as "mal-practice" and "neglect of duty" (1 Farrand 88) and "misconduct" (2 Farrand 68-69) because they were not restrictive enough and instead inserted the more serious "high crimes and misdemeanors". An exhaustive study of: Constitutional Grounds For Presidential Impeachment (1974), Impeachment - Selected Materials (1973), Impeachment - Selected Material and Procedures (1974), "Brief on behalf of the President of the United States" in An Analysis Of The Scope Of An Article Of Impeachment (1974), all 4 are publications of the House Judiciary Committee: Impeachment - Miscellaneous Documents (1974), a publication of the Senate Committee on Rules and Administration; An Analysis Of The Constitutional Standard For Presidential Impeachment (1974), written by counsels for the President (Charles Wright, James St. Clair, et al); Impeachment: A Handbook (1974), by C. L. Black; and The Law Of Impeachment (1974), issued by the Association of the Bar of the City of New York, leaves no doubt that A PRESIDENT CANNOT BE IMPEACHED JUST BECAUSE HIS ELECTION WAS FRAUDULENT.

Therefore, when the President is innocent of misconduct there is clearly no "textually demonstrable constitutional commitment of the issue to a coordinate political department," Baker v. Carr, supra, and the Federal Courts have jurisdiction. With this absence of "impeachable" misconduct by the President, the true character of the action is clearly apparent - it is an action to try a President's title to office.

To hold that the determining factor in assessing whether the Federal Courts have jurisdiction is whether or not a President has committed "impeachable" misconduct can only lead to an

Alice-in-Wonderland kaleidoscope of nonsense and mischief. The presence of "impeachable" misconduct is indeterminable unless the President has, in fact, been convicted by the Senate. So whether we have a case in which the President is innocent of "impeachable" misconduct and the Federal Courts thereby have jurisdiction is indeterminable. Certainly the mere allegation by defendant (or plaintiff) that the President committed "impeachable acts" in the corruption of his own election is not sufficient to remove Federal Court jurisdiction. And to dig deeper what if the President had committed "impeachable" misconduct but the Vice President had not: wouldn't a suit that found the election void and thereby terminated the Vice President's term of intrusion into office also automatically terminate the President's intrusion. Any further pursuit of this line just lends us deeper into the quagmire of contradictions for the above determining factor for ascertaining jurisdiction is unworkable and indeterminable...and obviously is nonsense.

What must be remembered and understood is that there are two distinct questions here: Is there impeachable conduct and is there a fraudulent election? (In one you try the President's misconduct, in the other you try his title to the Presidency.) Each can exist separately or they can co-exist. When they do co-exist, each should be pursued irregardless of the presence of the other question. And although a successful trial of an intruder's title to the Presidency may make impeachment moot, the impeachment and conviction (or resignation, etc.) of both the President and Vice President does not make the question of the Presidential election's validity moot, for its resolution shall determine whether there are to be new elections or there is to be an "acting" President for the remainder of the term.

2. THIS IS A CASE - JUDICIAL IN ITS CHARACTER - TO HEAR, TEST, AND DETERMINE THE RIGHT AND TITLE TO THE OFFICE OF PRESIDENT; A POWER CLEARLY DISTINCT FROM THE RIGHT OF CONGRESS TO IMPEACH AND CONVICT A PRESIDENT FOR "HIGH CRIMES AND MISDEMEANORS."

The best available meter to gauge the correctness of the above, is the manner in which states try their chief executives' right to office. All the states (except Oregon) have impeachment clauses in their Constitution giving their legis-

lature the power to impeach and convict officers of the state for acts which are never defined more restrictively than the U.S. Constitution's "high crimes and misdemeanors". Yet it is the common law and statutory practice of these states to test a man's right and title to a state office through the Courts or some other judicial mechanism established by the legislature...rather than through impeachment which is understood to try one's misconduct. One's title to an office and one's misconduct are stocastically independent questions: one may have committed no misconduct yet not have a legitimate title to an office; or one may have committed misconduct yet have a legitimate title to an office -- they are clearly separate questions.

In State v. Gleason, 12 Fla. 190 (1869), the Court terminated Gleason's intrusion into the office of Attorney General and held that the power to impeach executive officers, vested in the legislature, does not affect the jurisdiction of the Court to try the right of office, since the right of office is a proper matter of judicial cognizance and impeachment is not a remedy equivalent to, or intended to take the place of, quo warranto. (Note: Any remedy that could have been obtained at common law by writ of quo warranto may now be secured by civil action. See Slim Olson, Inc. v. National Inforcement Commission, 118 F. Supp. 861 (1954).)

Incidences of elections being voided and the usurper's term of intrusion into a state office being terminated because of unlawful and unconstitutional acts committed during an election are legion. The termination of a term of intrusion into the governorship is, however, infinitely more revealing than the terminations of supernumeraries.

In Hunt v. Campbell, 19 Ariz 300 (1917) the State Supreme Court ruled Campbell's election void and his title to office canceled and annulled almost a year after he took office and, in his place, installed Hunt, the rightful winner. In State ex rel Thayer v. Boyd, 31 Neb 682 (1891) and in State ex rel Sathre v. Moodie, 65 N.D. 350 (1935) the State Supreme Courts ruled that their election and title to the office of Governor were illegitimate and terminated their terms of intrusion into said office simply because they did not meet the necessary constitutional requirements of citizenship and residence respectively. In State ex rel Olsen v. Langer, 65 N.D. 68 (1934)

where the Governor was disqualified from holding office, the State Supreme Court struck marrow when they quoted State ex rel Moore v. Blake, 225 Ala 124, 142 - "[those who oppose the courts jurisdiction are] confusing causes for removal by impeachment with ineligibility to hold office."

Of even greater interest, however, are two opinions which expressed themselves better and more pointedly then petitioner could ever hope to. With the Court's tolerance petitioner shall utilize their words through the remainder of this section.

In the first case, State ex rel LaFollette v. Kohler, 200 Wis 518 (1930), LaFollette challenges Kohler's title to the Governorship claiming he had broken state election laws. The LaFollette Court vigorously expressed their cognizance of the importance of the questions before them:

> At this point it is not improper for us to say that we realize the importance which attaches to the decision in this case whatever it may be. A correct solution of the questions presented is of far greater importance than the personal or political fortunes of any candidate, incumbent, group, faction, or party. We are dealing here with laws which operate in the political field, a field with respect to which the power of the legislature is primary and is limited only by the constitution itself. It has been said so many times it scarcely needs to be said again, that the realization of the democratic ideal of self-government rests upon an intelligent, informed, honest, and vigilant electorate. It is because of this that a large percentage of the public revenues is devoted to the education of our youth in order that they may not only be informed but have their consciences awakened to their duties as citizens. All efforts to educate and awaken the electorate amount to nothing if corrupt appeals made to its prejudices or its cupidity lead it to cast a ballot otherwise than in accordance with its convictions, uninfluenced by anything save considerations of public policy. A democratic state must therefore have the power to protect itself against the consequences of ignorance, indifference, and venality and prevent all those practices which tend to subvert the electorate and substitute for a government of the people,

by the people, and for the people, a government guided in the interest of those who seek to pervert it. Id. at 545.

In quashing the argument that "the method by which he [the Governor] may be removed from office are prescribed by the Constitution [i.e. impeachment]" id. 545, the Court held that there was to be no removal involved but, rather, merely a termination of Kohler's intrusion into the governorship.

> It was held at common law that one who secured a plurality of votes cast at an election by means of fraud, bribery, intimidation, coercion, or misconduct of election officials, derived no title thereby to the office for which he was a candidate. In cases where the wrongdoing was such as to make it impossible to ascertain the true result of the election, there was held to be no election, or, as the phrase goes, "the election was held void." Id. at 549. See State ex rel Bell v. Conness, 116 Wis. 425. If the election is void and the candidate has intruded into the office, it is clear that he had no right thereto, and a judgment of ouster excluding him from the office and declaring it vacant is merely a summary and expeditious method of removing him therefrom. He does not by misconduct forfeit an office once lawfully acquired. He never secures title to it. It does not shorten his term because he was never elected. It terminates the term of his intrusion into the office. LaFollette v. Kohler supra at 552.

The U.S. Constitution says "The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed...." The Wisconsin Constitution said "The persons respectively having the highest number of votes for governor and lieutenant governor shall be elected." Except for the majority and electoral aspects they, in substance, read the same. It is therefore most instructive that the LaFollette Court held:

> Manifestly what the framers of the constitution had in mind and what they intended to say and what they did say was that the person receiving the highest number of lawful votes cast at a valid election for governor should be elected. At the common law as it existed at the time the constitution was framed and adopted, an election which was procured by fraud, intimidation, or corruption was no election. Id. at 555.
>
> A governor...cannot be elected at a void election any more than can a constable or coroner. Id. at 556.

Even the certificate of election of the vested authority was not found to be incontrovertible. "[T]he certificate is manifestly of no effect because there was no election. The certificate of election is not a title; it is a mere muniment of title...." Id. at 553. See State ex rel Drew v. Board of State Canvassers, 16 Fla. 17 (1877).

The U. S. Constitution and the Wisconsin Constitution identically provide that "each house shall be the judge of the elections, returns, and qualifications of its own members," giving a strong indication of how and with what words these two Constitutions would vest the jurisdiction for judging the election of other officials. But no provision for judging the elections of other officials is provided in either Constitution (other than the functional vote clauses - e.g., the Vice President in the presence of Congress shall "open all the certificates and the votes shall then be counted" Article 12, U.S. Constitution). The parallel is thus complete and it is therefore quite to the point when the LaFollette Court states, after taking note of the above facts concerning its Constitution:

> [I]n the absence of a provision of the constitution vesting the jurisdiction in some other branch of the government it is within the jurisdiction and power of the courts to determine in the manner provided by law whether or not an election of all other public officers [other than legislative officers] has been held in accordance with the manner prescribed by law....By so doing it does not enter the political field but confines itself to the exercise of judicial power. LaFollette v. Kohler, supra at 556.

The second case, an emphatic example of an intrusion into a governorship being terminated in an election dispute, is Attorney General ex rel Bashford v. Barstow, 4 Wis. 567 (1856). The statement of respondent "In my judgment this case is fraught with as much political and judicial importance as any case that has arisen since the organization of our govern-

ment," Id. at 655, could well be describing the instant case.

The Bashford Court, reacting with incredulity to the claim that a man's title to the governorship could not be tested and, if he was a usurper, his term of intrusion could not be terminated, asked "[I]s there no redress? Is there no power competent to inquire into his right to hold office, and protect the Constitution from invasion?" Id. at 747-748. The Court continued:

> [W]here is the remedy? What power of the state can give relief? Are we remediless? Instances of this kind might be multiplied to any extent. I put them, because there are many of them stated during the progress of the argument, and they are cases, too easily understood. And the question returns upon us, where is the protection of the people against them? Counsel seem to feel the necessity that there should be some remedy for them, and they significantly hinted where that remedy was to be found. It was to be found in a revolution. Ah! but that is not a constitutional remedy. It is one above the constitution. But we are now considering what means the constitution has provided for its own preservation. For if it has not those means, ample, adequate and equal to the political emergency of such, and other like cases, it is hardly worth spending any breath upon. Id. at 748.

With a pointedness that perfectly fits the instant appeal, the Bashford Court said:

> What power of this government is to settle this controversy? I think that the conclusion is irresistible, that it is a judicial power. If the contest cannot be settled at all. And if redress cannot come from that source, it can only come in a violent manner by revolution. And is this government thus powerless, impotent to correct an evil of this kind, impotent to shield its own high offices from usurpation? I cannot believe it. Id. at 749-750.

Not in spite of, but rather because of the importance of the Presidency the Courts should "hesitate to set a precedent in contravention of basic Constitutional principles that might permit or encourage some future high executive officer to become a despot." In re Nixon, 360 F. Supp. 1, 5 n.6

(D.D.C. 1973). The Bashford Court echoes this: "And here I may be permitted to repeat, that the higher and more sacred an office created by the Constitution may be, the stronger the reason and the greater the necessity for guarding it against unwarrantable intrusion." Bashford v. Barstow, supra at 780. And the Bashford Court seems to reach the pitch of anger when it declaims the immunity of a person who has made a successful intrusion into the governorship.

> [T]o claim exemption...on the ground that he has already succeeded in his intrusion or usurpation, then indeed, was the work of the framers of the constitution a mere sound, an empty expression - and the constitution itself is utterly helpless - open to invasion, unguarded, undefended, stripped of its armor, a declaration of principles without sanction, an idle convenant without obligation - a pompous pretension to supreme and fundamental law, but in fact a supple instrument in the hands of ambition, to be molded at convenience or defied at will, as the occasion may suggest. Id. at 761.

3. JUDICIAL REVIEW OF TITLE TO CONGRESSIONAL OFFICE OCCURRED IN "POWELL V. McCORMACK" 395 U.S. 486 (1969)

The House of Representatives denied Congressman-elect Powell title to his seat relying upon the power given to them in Article I, Section 5 (1) of the Constitution: "Each House shall be the judge of the...qualifications of its own members." In Powell v. McCormack, supra, filed by Powell to gain title to his seat, the Supreme Court held that they had jurisdiction for there was no "textually demonstrable Constitutional commitment of the issue to a co-ordinate political department," Baker v. Carr, supra, because "it is the province and duty of the judicial department to determine...whether [actions are]...in conformity to the Constitution; and if not to treat their acts as null and void." Powell v. McCormack, supra 506.

If a suit claiming that title to a seat in Congress was withheld by means not "in conformity to the Constitution" is justiciable, then surely a suit claiming title to the Presidency was acquired by means not "in conformity with the Constitution" is justiciable.

4. *IMPEACHMENT IS NOT THE ONLY METHOD BY WHICH CIVIL OFFICERS OF THE U.S. ARE REMOVED FROM OFFICE*

The First Congress (1789) rejected the notion that impeachment was the exclusive method by which civil officials could be removed and, standing on logic, agreed that executive officers appointed by the President may be removed by the President. The following two excerpts from the Debate in the First Congress (1 Ann. Cong. 496) express the consensus that impeachment was not an exclusive method of removal:

> *Mr. Madison did not conceive it was a proper construction of the Constitution to say that there was no other mode of removing from office than that by impeachment.... He believed they would not assert that any part of the Constitution declared that the only way to remove should be by impeachment....*
>
> *[Mr. Vining] viewed the power of removal, by impeachment, as a supplementary security to the people against the continuance of improper persons in office; but it did not consist with the nature of things, that this should be the only mode of removal; it was attended with circumstances that would render it insufficient to secure the public safety, which was a primary object of every government.*

Just because an executive officer is open to impeachment does not mean he is immune from dismissal: likewise, just because a President is open to impeachment does not mean the judiciary cannot try his title and right to office and if found lacking, terminate his term of intrusion into the Presidency. The impeachment clause was not meant to pre-empt logic and leave the Constitution defenseless and unfunctional.

In fact, the Impeachment Clause gives no hint of being the exclusive method of removal. The "on" in "shall be removed from office on Impeachment for, and Conviction of..." merely indicates that if such and such happens then the President will therein be removed from office.

The XXV Amendment provides a mechanism by which a President may be removed for disability. Presidents who are "acting" Presidents may be removed from office under Article II, Section 1(5), and the XX and the XXV Amendment, and under the Presidential Succession Act of 1948 when a President qualifies for office or a disability is removed. Obviously impeachment is not and was not meant to be the only means of removal.

5. *THE 20TH AMENDMENT AND THE PRESIDENTIAL SUCCESSION ACT OF 1948 ANTICIPATES THE SELECTION OF PRESIDENTS AFTER THE COMMENCEMENT OF CONSTITUTIONAL TERM OF OFFICE AND PROVIDES THAT HE WHO ACTS AS PRESIDENT SHALL BE REMOVED UPON SAID SELECTION*

A voided election means that there has been no election and that nobody has qualified for the Presidency or Vice Presidency...thereby immediately activating the 20th Amendment (Section 3) which provides for such contingencies:

> *If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.*

This amendment clearly gives to Congress the function of determining who shall "act" as President when an election is voided and a President has yet to be elected. The District Court was, therefore, clearly in error when it said "the manner of succession and the timing thereof is explicitly set forth in Article II and in the 25th Amendment."

The Succession Act of 1948 (Title 3 U.S.C. Section 19) provides that when a President-elect or a Vice President-elect has qualified the "acting" President shall be removed (cease to act).

> *Section 19(c): An individual acting as President...shall continue to act until the expiration of the then current Presidential term, except that - (1)if his discharge of the powers and duties of the office is founded in whole or in part on the failure of both the President-elect and the Vice-President-elect to qualify, then he shall act only until a President or Vice President qualifies....*

The Succession Act of 1792 and to a lessor extent the Succession Act of 1886 envisioned special elections when the offices of both the President and Vice President became vacant. The Truman Administration's version of the 1948 Presidential Succession Act also contained provisions for midterm elections. Surely then, new elections are a viable remedy....

6. THE FUNCTION OF JUDGING THE CONSTITUTIONAL AND LEGAL VALIDITY OF A PRESIDENTIAL ELECTION AND THE COINCIDENT TITLE TO THE PRESIDENCY IS NOT TEXTUALLY COMMITTED TO CONGRESS BY THE 12TH AMENDMENT

The pertinent part of the 12th Amendment reads:

> The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall be counted: - The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed....(emphasis added)

The straight forward language of the count clause had but one purpose - to constitutionally commit to the President of the Senate and to the Congress the duty of counting the votes. The existence of the parallel clause "each house shall be the judge of the election, returns, and qualifications of its own members", a strong and clear commitment of a judicial function, indicates what the count clause would have been like if the constitutional convention had given it judicial powers.

Under the power of the necessary and proper clause, Congress passed electoral vote counting statutes in 1877, 1887 and in 1948 (title 3 U.S.C. Section 15), which gave them quasi judicial powe-, but the debates on the bills clearly indicate that they do not wish to enlarge their jurisdiction.

The most authoritive opinions handed down on this issue are those of the Tilden-Hayes Electoral Commission which was set up to resolve the Presidential election dispute of 1876 and was made up of Congressmen and Supreme Court Justices. They held in their order and report of Feb. 27, 1877 (The Proceedings of the Electoral Commission p. 285) that "there exists [no power] in the two Houses of Congress in counting of the electoral vote, to inquire into the circumstances under which the pri-

mary vote for electors was given" - a majority of the Supreme Court Justices on the Commission concurred in this order and report. In his written statement submitted for the record, Commissioner Justice Bradley reiterated the majority opinion when he said "the two Houses of Congress cannot institute any scruting into the appointment of Presidential electors, as they may and do in reference to the election of their members. The utmost they can do is to ascertain whether the State has made an appointment according to the form prescribed by its laws." Additionally, as was fully manifested in the recent dispute in the Senate over a New Hampshire Senate Seat, Congress totally lacks the facility or desire to handle even their own election disputes.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Date: September 15, 1975

RESPECTFULLY SUBMITTED

Charles Bradley Griffith
- pro se -
Box 291, Putney, Vermont

APPENDIX

Decision of the United States Court of Appeals - Second Circuit (Griffith v. Nixon, June 17, 1975)

Per Curiam:

Article II of the Constitution provides that the President of the United States shall hold his office for a term of four years, that he shall be elected at a time to be chosen by the Congress and that he shall be removed by impeachment and conviction.

The complaint in this pro se class action, brought on behalf of fifty million registered voters, sought a District Court order nullifying the 1972 presidential election and directing the holding of a new election on November 5, 1974. The District Judge wisely decided that his duty was limited to interpreting the Constitution, not rewriting it.

The complaint also sought damages aggregating $22,050,000 against then President Nixon personally and the two committees which participated in his 1972 campaign. The marshal's return of service indicates that he attempted to effect service on all of the defendants by delivering copies of the summons and complaint to the U. S. Attorney in Rutland, Vermont and mailing copies by certified mail to the named defendants in Washington. The District Court of Vermont did not thus acquire personal jurisdiction of these non-resident defendants under either Rule 4 of the Federal Rules of Civil Procedure or Rule 4 of Vermont's Rules of Civil Procedure.

To the extent that damages were sought against the President personally, Federal Rule 4(d)(5) is not applicable. 2 J. Moore, Federal Practice, at 1206; Green v. Laird, 357 F. Supp. 227 (N. D. Ill. 1973). This rule prescribes a method for service upon the President in his official capacity, not where personal liability for damages is sought to be imposed. We have already noted that plaintiff's demand for injunctive relief against the President in his official capacity cannot be granted.

Vermont Rule 4(e) provides that service outside of the State must be made in the same manner as if such service were made within the State. There is no provision for service within the State by delivery of the summons and complaint to a United States Attorney and the mailing of another copy to the defendant.

For the reasons above stated, the District Court's order of dismissal is affirmed.

Decision of the United States District Court, District of Vermont (Griffith v. Nixon, September 26, 1974)

The plaintiff in this action filed a fifty page pro se complaint against Richard M. Nixon, individually and as President of the United States, the Committee for the Re-election of the President and its Finance Committee. The complaint is asserted on behalf of "50,000,000 members, consisting of all U.S. citizens who were registered to vote in the 1972 Presidential election." Plaintiff seeks class action status, a declaratory judgment that the "1972 Presidential elections [are] null and void," mandatory relief ordering that "new elections be held November 5, 1974" and compensatory and punitive damages in the amount of $22,025,000.00.

It is alleged that "the defendants and their agents, in violation of 42 U.S.C. Section 1985(3), did conspire to and did deprive him and others similarly situated - of his (their) right and privilege as a Citizen of the United States to 'Free Elections'...."

The plaintiff lists ninety-five acts of suppression, repression, espionage, extortion and fabrication that the defendants allegedly used to "unlawfully manipulate the political-electoral-nominational processes of the Democratic Party to prevent the nomination of a strong Democratic Presidential candidate in 1972." After written and oral argument the case is presently before the Court for disposition of the defendants' motions to dismiss. (See n.1) These motions challenge the plaintiff's standing, justicability, in personam jurisdiction and venue. (See n.2)

The plaintiff's pray that the Court declare that the 1972 Presidential Election was null and void, that it order new national primaries, provide for the election and inauguration of a new President and Vice President and declare the defendant Richard M. Nixon an ineligible candidate for such election. Where the Constitution assigns a particular function wholly and indivisably to another department, the federal judiciary will not intervene. Oetjen v. Central Leather Co., 246 U.S. 297 (1917). Such matters are said to raise non-justiciable political questions which remove the case from the jurisdiction of the federal courts. The doctrine was stated by the Supreme Court in Baker v. Carr, 369 U.S. 186, 217 (1962) as follows:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. (emphasis added)

In the instant case the removal and the manner of succession of a president are explicitly committed by the Constitution to the Congress and not the Courts. The remedy for the types of acts complained of in this case is vested in Congress by virtue of Article II, Section 4, which states, "The President, Vice President, and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The manner of succession and the timing thereof is explicitly set forth in Article II and in the 25th Amendment, as is the manner in which the Vice President is to be selected upon a vacancy in that position. Since there is a "textually demonstrable constitutional commitment of the issue" raised by this aspect of the request for relief, it seeks to present a nonjusticable political controversy that is inappropriate for decision by this Court. See Hart and Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) 233-41.

Since the complaint does request money damages for deprivation of his right to vote by the alleged violations of 42 U.S.C. Section 1985(3) by the defendants, the Court must address the question of whether venue is properly laid in this district. The appropriate statute, 28 U.S.C. Section 1391(b), provides, "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought

only in the judicial district where all defendants reside, or in which the claim arose...." It appears that none of the defendants reside in Vermont, thus venue is proper only if the plaintiff's claim arose in Vermont. The plaintiff's claim involves the alleged deprivation of his right to "free elections" in the 1972 presidential election. The deprivation of his right to vote in a free election can only be said to arise in Vermont if he was a registered voter and did in fact vote in Vermont in the 1972 presidential election. The plaintiff has only alleged that he was "a registered voter in the 1972 Presidential election - is a Citizen of the United States now residing in the County of Windham, State of Vermont." There is no allegation that he was registered to vote here or that he did in fact vote in Vermont in 1972. Therefore, the complaint cannot be construed to allege that the plaintiff's claim arose in the District of Vermont.

Even assuming, arguendo, that the matter is an appropriate one for a class action, venue would still be improper. In a class action the named parties must adhere to the applicable venue requirements. Wright and Miller, Federal Practice and Procedure Section 1757.

The want of proper venue makes it unnecessary for the Court to deal with the remaining questions raised by the motion to dismiss.

It is ORDERED: That in so far as the complaint requests a declaration that the 1972 presidential election is null and void and requests a new presidential election, it is dismissed for lack of jurisdiction. The remainder of the complaint is dismissed for lack of proper venue in this district.

Dated at Rutland, in the District of Vermont, this 26th day of September, 1974.

James S. Holden
Chief Judge

Footnote

n1. The Court takes judicial notice of the fact that the defendant Richard M. Nixon resigned from the office of the president effective August 9, 1974. This,

however, does not render the case moot because there is further relief requested by the plaintiff in that he asks this Court to order a new election and to award money damages. See DeFunis v. Odegaard, 42 U.S.L.W. 4578.

n2. Service of the summons and complaint, as to all defendants, was made on George W. F. Cook, United States Attorney at Rutland, Vermont, on March 21, 1974. On May 16, 1974 the United States of America by George W. F. Cook, United States Attorney for the District of Vermont, moved that the United States be permitted to appear as amicus curiae, and filed a memorandum of law seeking the dismissal of the action, asserting lack of jurisdiction in the Court to adjudicate the non-justiciable political question alleged in the complaint and the plaintiff's lack of standing to maintain the suit. There has been no appearance entered by the defendant Richard M. Nixon. The Committee for the Re-election of the President and its Finance Committee have moved to quash the summons and dismiss the complaint for the reasons stated. It appears that the manner and method of service are not in accord with the provisions of Rule 4, Fed. R. Civ. P.

Petitioner's Note: In District Court's dismissal order, some sloppy errors are made in their statement of the case, e.g., plaintiffs are not all U.S. citizens who where registered to vote in the 1972 Presidential elections - they most conveniently dropped off additional qualifying "who" clauses (see Petitioner's "Statement of Case" for correct definition of plaintiffs); also, there was no request in the complaint to declare President Nixon an ineligible candidate in a new election.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Impeachment Clause:

Article II, Section 4: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Sussession Clauses:

Article II, Section I (5): In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removeal, Death, Resignation or Inability, both of the President, and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected

20th Amendment, Section 3: See page 17.

25th Amendment, Section 1: In case of the removal of the President from office or of his death or resignation, the Vice President shall become President. Section 2: Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Presidential Succession Act of 1948:

Title 19 U.S.C. Section 19 (a,b,c): (a) (1) If, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President, then the Speaker of the House of Representatives shall, upon his resignation as Speaker and as Representative in Congress, act as President. (2) The same rule shall apply in the case of the death, resignation, removal from office, or inability of an individual acting as President under this section. (b) If, at the time when under subsection (a) of this section a Speaker is to begin the discharge of the powers and duties of the office of President, there is no Speaker, or the Speaker fails to qualify as Acting President, then the President pro tempore of the Senate shall, upon his resignation as President pro tempore and as Senator,act as President.

(c) An individual acting as President under subsection (a) or subsection (b) of this section shall continue to act until the expiration of the current Presidential term, except that--(1) if his discharge of the powers and duties of the office is founded in whole or in part on th e failure of both the President-elect and the Vice President-elect to qualify, then he shall act only until a President or Vice President qualifies; and (2) if his discharge of the powers and duties of the office is founded in whole or in part on the inability of tne President or Vice President, then he shall act only until the removal of the disability of one of such individuals.

Supreme Court, U. S.
FILED
NOV 6 1975
MICHAEL RODAK, JR., CLERK

No. 75-417

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES BRADLEY GRIFFITH, PETITIONER

v.

RICHARD M. NIXON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner filed a complaint *pro se* in the United States District Court for the District of Vermont against Richard M. Nixon, individually and as President of the United States, the Committee to Reelect the President, and the Finance Committee to Reelect the President. Petitioner sought a declaratory judgment setting aside the 1972 Presidential election, an order requiring the holding of new elections on November 5, 1974, and compensatory and punitive damages aggregating $22,050.000.[1] In support of his requests for relief petitioner alleged that

---

[1]Petitioner also sought the certification of a class, assertedly made up of "50,000,000 members, consisting of all U.S. citizens who were registered to vote in the 1972 Presidential election" (Pet. App. 22-b).

the defendants had interfered with the nominating process of the Democratic Party and had conspired to deprive him and others similarly situated of their lawful right to vote for a qualified presidential and vice-presidential candidate, in violation of 42 U.S.C. 1985(3). Service on the defendants was attempted by delivering copies of the summons and complaint to the United States Attorney for Vermont and by mailing additional copies by certified mail to the defendants in Washington, D.C. (Pet. App. 22-a to 22-b).

The United States Attorney appeared as *amicus curiae* in the district court to urge that the President of the United States is not subject to suit. The district court, relying on *Baker* v. *Carr*, 369 U.S. 186, found that the validity of the 1972 presidential election was a non-justiciable political question. The district court further held that petitioner had failed to obtain personal jurisdiction over the defendants and that, so far as the claim for money damages was concerned, venue did not properly lie in Vermont (Pet. App. 22-b to 22-e). The court of appeals affirmed *per curiam* (518 F.2d 1195; Pet App. 22-a to 22-b).

The equitable relief sought by petitioner would require the removal from office of the incumbent President. The courts below correctly decided that the removal from office of a sitting President is a matter textually committed to the legislative branch under Article II, Section 4, of the Constitution and is therefore not justiciable. See, *e.g. Powell* v. *McCormack*, 395 U.S. 486, 518-519; *Baker* v. *Carr*, *supra*, 369 U.S. at 217. The petition for a writ of certiorari should be denied insofar as it seeks review of that question.

We take no position with respect to those claims for relief directed against the defendants in their individual capacities.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

DOJ-1975-11